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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER	
MAHAFKEY, KELLY J	

ART UNIT	PAPER NUMBER
1761	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/787,253	LADD ET AL.	
	Examiner	Art Unit	
	Kelly Mahafkey	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) 1-33 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) 1-33 is/are rejected.

7)☒ Claim(s) 8-13 is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date 8/18/06 & 8/21/06.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claim Objections

The numbering of claims is not in accordance with 37 CFR 1.126 which requires the original numbering of the claims to be preserved throughout the prosecution. When claims are canceled, the remaining claims must not be renumbered. When new claims are presented, they must be numbered consecutively beginning with the number next following the highest numbered claims previously presented (whether entered or not).

Misnumbered claim 9 has been renumbered claim 8; misnumbered claim 10 has been renumbered claim 10; misnumbered claims 11-33 have been renumbered claims 10-32 respectively.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-33 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term "reduced sufficiently" in claim 1 is a relative term which renders the claim indefinite. The term "reduced sufficiently" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. It is unclear as to what quantity of sugar must be contained in the premix for the premix to be considered to have "sufficiently reduced" sugar content. Additionally, line 3 of claim 1 refers to " the composition, it is not clear what composition the claim is referring to; there is no antecedent basis for this term.

Claims 2-4 and 17-19 are rejected under 35 U.S.C. 112, second paragraph, as being incomplete for omitting essential steps, such omission amounting to a gap between the steps. See MPEP § 2172.01. The omitted steps are: Claim 2 recites

raising the fusing point of the dessert, but omits the essential steps necessary to raise the fusing point of the dessert; Claim 3 recites elevating the melting point of the dessert, but omits the essential steps necessary to elevate the melting point of the dessert; Claim 4 recites elevating the melting and fusing points of the dessert, but omits the essential steps necessary to elevate the melting and fusing points of the dessert; Claims 7 and 9 recite, "whereby the pelletized product *can be* an ice cream...", but omits the active step of claiming that the "pelletized product *is* an ice cream..."; Claim 17 recites "wherein the addition of stabilizers inhibits the fusing of pellets", but omits the active step of "adding stabilizers to the dessert premix"; Claim 18 recites, "the pelletized dessert can be served at a thermally safe level", but omits the active step of "serving the pelletized dessert at a thermally safe level; Claim 20 recites "wherein the addition of stabilizers inhibits the fusing of pellets", but omits the active step of "adding stabilizers to the dessert premix".

Claim 6 recites the limitation "formulation alteration" in claim 1. There is insufficient antecedent basis for this limitation in the claim.

The term "maintains the desired sweetness level at generally the same level as a premix containing from about 13% to about 17% sugar" in claim 6 is a relative term which renders the claim indefinite. The terms "desired sweetness" and "at generally the same level" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. It is unclear as to the "sweetness" that the dessert must posses in order to have the "desired sweetness" which is "generally at the same level" of another dessert product. It is unclear as to who determines what is desirable and as to what degree of difference in sweetness would still be considered to be "generally the same".

The term "sucrose equivalent" in claims 9 and 31 is a relative term, which renders the claim indefinite. The term "sucrose equivalent" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the

invention. It is unclear as to which sugars would be consider "equivalent" to sucrose and which ones would not be considered "equivalent" to sucrose.

The term "commercially available artificial sweetener" in claim 13 is a relative term that renders the claim indefinite. The term is indefinite because it is not known what sweetener is included or excluded, as there are many types of artificial sweetener; the scope of the claim cannot be determined.

Claim 14 recites, "Where other artificial sweeteners can be one or more of the following..." It is unclear as to what the primary artificial sweeteners are when the "other" sweeteners are added to the composition.

The term "artificial sweeteners can be those yet to be developed for use as sugar replacements" in claim 16 is a relative term which renders the claim indefinite. The term "artificial sweeteners can be those yet to be developed for use as sugar replacements" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. It is unknown as to what artificial sweeteners are "yet to be developed".

Claims 23 and 24 recite, "the frozen dessert premix is for an ice cream product requiring additional sweetness and has a total sugar content..." It is unclear of the ice cream products requires "additional" sugars, in addition to the already claimed sugars, or if the claimed sugars provide the "additional sweetness" as instantly claimed.

Claims 25-27 recite the limitation "vanilla ice cream premix" in claim 19. There is insufficient antecedent basis for this limitation in the claim. Claim 19 does not recite a "vanilla ice cream premix", to which claims 25-27 refer.

Claims 28-30 recite the limitation "chocolate ice cream premix" in claim 19. There is insufficient antecedent basis for this limitation in the claim. Claim 19 does not recite a "chocolate ice cream premix", to which claims 28-30 refer.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-5 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jones (US 5126156) in view of Tomita et al. (US 5403611).

Jones teaches of a method for forming a pelletized dessert product comprising introducing a premix into a body of liquid cryogen (Column 2 lines 16-29). Jones teaches that the frozen dessert can be an ice cream product (Column 1 lines 10-15). Jones teaches that the final product is maintained in a freezer at –20F if it is to be stored for periods greater than 30 hours, and that prior to serving, the product is brought to a temperature of –15F (Column 2 lines 57 through Column 3 line 12). Thus one of ordinary skill in the art at the time the invention was made would expect the pellets as taught by Jones to maintain their individuality at a temperature of –20F for more than 30 hours and at a temperature of –15F (i.e. a thermally safe level for freezing) for less than 30 hours.

Jones teaches the premix can be dairy based (Column 4 lines 56-62), however, is silent to the specific composition utilized to form the ice cream dairy dessert.

Tomita teaches that ice creams are generally made from 3-20% milk fat, 3-12% non-fat milk solids, 8-20% sugar, and if necessary, a small amount of a stabilizer, an emulsifier, a color, flavors, and the like (Column 1 lines 45-64).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use a premix comprising 3-20% milk fat, 3-12% non-fat milk solids, 8-20% sugar, and if necessary, a small amount of a stabilizer, an emulsifier, a color, flavors, and the like for the ice cream dessert product as taught by Jones. One would have been motivated to do so since Jones teaches of making a dairy based ice cream product but does not teach a composition for doing so, and since Tomita teaches of a general dairy based composition for ice cream products. Since, the premix for the ice cream product as taught by Jones in view of Tomita contains 8% sugar, one of ordinary skill in the art at the time the invention was made would expect the premix for

the ice cream product as taught by Jones in view of Tomita to have a raised melting point compared to a premix with about 13-17% sugar.

Claims 6, 7, and 9-30 rejected under 35 U.S.C. 103(a) as being unpatentable over Jones (US 5126156) in view of Tomita et al. (US 5403611), further in view of Cole et al. (US 4374154).

Jones in view of Tomita teach of an ice cream product premix that contains optional stabilizers and flavoring agents. The references, however, are silent to the specific optional ingredients that are included in the ice cream product.

Cole teaches of an ice cream product with a similar composition to that as taught by Jones in view of Tomita. Cole teaches that the ice cream premix contains 0-2%, preferably 0.1-0.6%, stabilizers, including gums, in order to improve the shelf life of the ice cream product (Column 6 lines 19-32). Cole teaches that artificial sweeteners, including saccharin and aspartame, were added to the ice cream premix in order to adjust the sweetness of the final composition (Column 6 lines 51-62).

Specifically regarding the ice cream premix as containing stabilizers, as recited in claims 16, 17, 19, and 25-30, Cole teaches that preferably 0.1-0.6% stabilizers, including gums, are utilized in premixes for ice cream desserts in order to improve the shelf life of the ice cream product. It would have been obvious to one of ordinary skill in the art at the time the invention was made to use a premix comprising 0.1-0.6% gum (i.e. stabilizer) as taught by Cole in the ice cream dessert premix as taught by Jones in view of Tomita. It would have been obvious to one of ordinary skill in the art at the time the invention was made to use a conventional stabilizer in a conventional amount as taught by Cole. One would have been further motivated to do so in order to improve the shelf stability of the dessert product as taught by Cole.

Specifically regarding the ice cream premix as containing an artificial sweeteners, as recited in claims 6, 9, 10, 12-15, and 20-24, Cole teaches that artificial sweeteners, including saccharin and aspartame, were added to the ice cream premix in order to adjust the sweetness of the final composition. It would have been obvious to one of ordinary skill in the art at the time the invention was made to add an artificial sweetener,

such as aspartame, to the ice cream premix as taught by Jones in view of Tomita in order to increase the sweetness level of the final product. It would have been further obvious to one of ordinary skill in the art at the time the invention was made to include a particular amount of an artificial sweetener depending on the desired sweetness in the final product. Furthermore, to use one artificial sweetener or another artificial sweetener would be to substitute one functional equivalent for another and would not make a patentable distinction to the claims. One of ordinary skill in the art at the time the invention was made would have been motivated to chose one artificial sweetener over another depending on which sweetener was most readily available when the product was made.

Claims 31-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cole et al. (US 4374154) in view of Igoe et al. (Dictionary of Food Ingredients, 3rd Edition 1996).

Cole teaches of a premix for a frozen dessert comprising 3-15% milk fat (Column 5 lines 7-20), 2-10% non-fat milk solids (Column 5 lines 25-42), about 7% sucrose (Table 3 Run # 17 and 19), and artificial sweeteners, including aspartame (Column 6 lines 51-62). Cole teaches that the premix can be free of artificial sweeteners, or that artificial sweeteners can be used to adjust the product to meet a desired level of sweetness. Cole, however, is silent to the amount of artificial sweetener to use in the frozen dessert premix.

Igoe, page 14, teaches that aspartame is an artificial sweetener, which is utilized, in frozen desserts. Igoe teaches that aspartame is used at a level of 0.01-0.02%.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use 0.01-0.02% aspartame in the frozen premix as taught by Cole because it is a conventional amount to be used in a frozen dessert as taught by Igoe. It would have been further obvious to one of ordinary skill in the art at the time the invention was made to add more than 0.02% aspartame when desiring to increase the sweetness level of the final product.

Note: The claim, as instantly recited, is directed to a premix for a frozen dessert and not the frozen dessert itself. As taught by Cole, the ingredients of the frozen dessert are first combined before being frozen (i.e. the ingredients form a premix before freezing).

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/
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